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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SCOTT McLAUGHLIN, et al.,
*Petitioners*,

v.

NORTH CAROLINA BOARD OF ELECTIONS, et al.,
*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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17 pp

# INDEX

TABLE OF CASES AND AUTHORITIES . . . . . iii

STATEMENT OF THE CASE . . . . . 1

I. PROCEDURAL HISTORY . . . . . 1

II. STATEMENT OF THE FACTS . . . . . 1

III. SUMMARY OF THE ARGUMENT . . . . . 2

IV. REASONS FOR DENYING THE WRIT . . . . 3

A. THE TEN PERCENT (10%) BALLOT RETENTION REQUIREMENT IS NOT PER SE UNCONSTITUTIONAL AND IT IS REASONABLE WITHIN THE CONTEXT OF THIS CASE TO PROTECT A LEGITIMATE STATE INTEREST OF PROTECTING THE INTEGRITY OF THE ELECTION PROCESS. . . . . 3

B. THERE IS NO CONFLICT BETWEEN THE FOURTH AND TENTH CIRCUITS ON THE ISSUE OF CHANGING THE PUBLIC REGISTRATION RECORDS AS TO THE AFFILIATION OF REGISTERED VOTERS WITH A DEFUNCT PARTY. . . . . 9

V. CONCLUSION . . . . . 13

## TABLE OF CASES AND AUTHORITIES

### CASES

*American Party of Texas v. White*,
415 U.S. 767 (1974) . . . . . 3, 6

*Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982), *cert. denied*, 461 U.S. 13 (1983) . . . . . 5, 12

*Baer v. Meyer*, 782 F.2d 471
(10th Cir. 1984) . . . . . 9, 10, 12

*Gaffney v. Cummings*, 412 U.S. 735 (1973) . . . . . 7

*Iowa Socialist Party v. Nelson*,
909 F.2d 1175 (8th Cir. 1990) . . . . . 11

*Jenness v. Fortson*, 403 U.S. 431 (1971) . . . . 3, 5

*Libertarian Party of Alabama v. Wallace*,
586 F. Supp. 399 (M.D. Ala. 1984) . . . . . 5

*Libertarian Party of Florida v. State of Florida*, 710 F.2d 970 (11th Cir. 1983) . . . . . 6

*Libertarian Party of Virginia v. Davis*,
766 F.2d 865 (4th Cir. 1985) . . . . . 5

*McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373
(M.D.N.C. 1994) . . . . . 12

*Patriot Party of Pennsylvania v. Mitchell*,
826 F. Supp. 926 (E.D. Pa.), *aff'd*,
9 F.3d 1540 (3rd Cir. 1993) . . . . . 5

*Rainbow Coalition of Oklahoma v. The Oklahoma State Election Board*, 685 F. Supp. 1193 (W.D. Okl. 1987), *aff'd*, 844 F.2d 740 (10th Cir. 1988) . . . . . 5, 12

*Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988) . . . . . 10, 12

*Socialist Workers Party v. Hechler*, 696 F. Supp. 190 (S.D.W.Va. 1988), *aff'd in part*, 890 F.2d 1313 (4th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) . . . . . 5

*Storer v. Brown*, 415 U.S. 724 (1994) . . . . . 3, 6

**STATUTES**

N.C. GEN. STAT. § 105-159.1 . . . . . 4
N.C. GEN. STAT. §§ 132-1 thru -9 . . . . . 11
N.C. GEN. STAT. § 163-59 . . . . . 11
N.C. GEN. STAT. § 163-66 . . . . . 4
N.C. GEN. STAT. § 163-69 . . . . . 12
N.C. GEN. STAT. § 163-74(a1) . . . . . 11
N.C. GEN. STAT. § 163-96(a)(1) . . . . . 4
N.C. GEN. STAT. § 163-97 . . . . . 4
N.C. GEN. STAT. § 163-97.1 . . . . . 4
N.C. GEN. STAT. § 163-98 . . . . . 11
N.C. GEN. STAT. §§ 163-104 thru -116 . . . . . 11
N.C. GEN. STAT. §§ 163-278.6 thru -278.40I . . . . 4
N.C. GEN. STAT. § 163-278.41 . . . . . 4

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BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

The procedural history of the case is accurately stated in the Petition.

### II. STATEMENT OF THE FACTS

The facts are accurately stated in the Petition.

## III. SUMMARY OF THE ARGUMENT

A. Statutory schemes that allow groups organized for political purposes to become recognized political parties and gain access to the ballot by filing petitions with signatures equal to two percent (2%) or less of those who voted for governor or president and that require a ballot qualified party to obtain ten percent (10%) of the votes for governor or president to remain a recognized political party and retain ballot access have consistently passed constitutional muster in all federal courts. Such schemes reasonably carry out a state's legitimate interest to assure the integrity of its electoral process by eliminating ballot clutter and assuring that all parties listed on the ballot have a modicum of support. A higher disaffiliation requirement than an entrance requirement is not *per se* unconstitutional where it applies equally to all parties and it does not freeze out future access. The historical record shows that parties that have lost ballot access in North Carolina can and do regain it through the petitioning process. Petitioners have failed to show that North Carolina's scheme is constitutionally suspect.

B. When a political party loses all status as a recognized party, states that conduct closed primaries may constitutionally require that the affiliation of the defunct party's registrants be changed to either a recognized party or to unaffiliated. To hold otherwise would leave the registration lists cluttered with minor, unrecognized party affiliates that would create needless burdens in administering the closed primary law. A defunct political party has no constitutional right to have a state promote it by keeping records of its affiliates when these records serve no state interest. There is no conflict in the Circuits on these basic propositions.

## IV. REASONS FOR DENYING THE WRIT

### A. THE TEN PERCENT (10%) BALLOT RETENTION REQUIREMENT IS NOT PER SE UNCONSTITUTIONAL AND IT IS REASONABLE WITHIN THE CONTEXT OF THIS CASE TO PROTECT A LEGITIMATE STATE INTEREST OF PROTECTING THE INTEGRITY OF THE ELECTION PROCESS.

The issue presented by Petitioners is whether the North Carolina scheme that makes ballot retention more rigorous than ballot access passes constitutional muster within the context of decided cases and the total statutory scheme. Their position is based upon the comment in *Storer v. Brown*, 415 U.S. 724, 737 (1994), that "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." The District Court and the Court of Appeals concluded the retention rule did pass muster.

It is beyond dispute that the two percent (2%) requirement to obtain initial ballot access passes constitutional muster. It satisfies the legitimate state interest of insuring the integrity of the election process by reducing ballot clutter and granting access only to parties that have demonstrated a significant modicum of support. *Jenness v. Fortson*, 403 U.S. 431 (1971), and *American Party of Texas v. White*, 415 U.S. 767 (1974).

North Carolina's test for ballot retention demands that a recognized, ballot qualified party "at the last preceding

general State election, [poll] for its candidate for Governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State for Governor or for presidential electors." N.C. GEN. STAT. § 163-96(a)(1).

The statutory scheme mandates that failure to poll the requisite ten percent (10%) will carry the following consequences:

(1) Total loss of status as a political party qualified to have the names of its candidates printed on the ballot. N.C. GEN. STAT. § 163-97.

(2) Total loss of the right of individual members of the party to have their affiliation with the defunct party shown on the registration rolls. N.C. GEN. STAT. § 163-97.1.

(3) Total loss of the right of the defunct party to receive free lists of names of registered voters from the county boards of elections, N.C. GEN. STAT. § 163-66.

(4) Total loss of the right to receive public funds contributed by taxpayers. N.C. GEN. STAT. § 163-278.41 and N.C. GEN. STAT. § 105-159.1.

Gaining or losing status as a recognized political party does not affect a group's duty to report and disclose political contributions and expenditures under laws that regulate contributions and expenditures in political campaigns. Political activity, not ballot status, triggers the reporting and disclosure provisions. N.C. GEN. STAT. §§ 163-278.6 through -278.40I.

The prerequisite ten percent (10%) to retaining recognition applies equally to all political parties. Thus, if either the Democratic or Republican party failed to poll the requisite vote, either would lose total recognition and ballot access. The assumption that these "major" parties will always obtain commanding percentages, remain recognized and have ballot access is belied by history. The Federalist Party and the Whig Party, major parties in their day, each became defunct. This record presents no evidence or reason to suppose that the same fate could not befall the two "major" parties.

Two-tier schemes that require a party to exhibit a greater showing of support to remain on the ballot than to get on the ballot initially have been upheld in numerous cases by this Court and lower federal courts. *Jenness v. Fortson*, *supra*, (5% access, 10% retention); *Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982), *cert. denied* 461 U.S. 13 (1983) (5% access, 10% retention; 10% retention not unconstitutional *per se*); *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985) (.5% access requirement for statewide office, 10% retention); *Rainbow Coalition of Oklahoma v. The Oklahoma State Election Board*, 685 F. Supp. 1193 (W.D. Okl. 1987), *aff'd* 844 F.2d 740 (10th Cir. 1988) (5% access, 10% retention); *Socialist Workers Party v. Hechler*, 696 F. Supp. 190 (S.D.W.Va. 1988), *aff'd in part*, 890 F.2d 1313 (4th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (1% access, 10% retention); *Patriot Party of Pennsylvania v. Mitchell*, 826 F. Supp. 926 (E.D. Pa.), *aff'd* 9 F.3d 1540 (3rd Cir. 1993) (2% access, 15% retention); *Libertarian Party of Alabama v. Wallace*, 586 F. Supp 399 (M.D. Ala. 1984) (1% access, 20% retention)

Petitioners recognize that a state has a legitimate interest to protect the integrity of its electoral process by reducing ballot clutter. One way to achieve this goal is to require those who seek to be on the ballot to demonstrate a significant modicum of support. They argue, however, that a ten percent (10%) retention requirement rises above a "modicum" and becomes "onerous." They ask this Court to adopt, as a constitutional requirement, that a retention requirement cannot exceed the access percentage.

The error of Petitioners' position is demonstrated by the following observation of the Tenth Circuit in *Libertarian Party of Florida v. State of Florida*, 710 F.2d 970 (11th Cir. 1983), a case involving an attack on an access.

> Obviously any percentage or numerical requirement is "necessarily arbitrary." *American Party of Texas v. White*, 415 U.S. at 783, 94 S.Ct. at 1307. Once a percentage or number of signatures is established, it would probably be impossible to defend it as either compelled or least drastic. At any point, probably a fraction of a percentage point less, or a few percentage points less would not leave the interests the state unprotected. Any numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all. This not the thrust of the [Supreme] Court's teachings however. . . . The focal point of this inquiry is whether a "reasonably diligent [] candidate [can] be expected to satisfy the . . . requirements." *Storer v. Brown*, 415 U.S. at 783, 94 S.Ct. at 1285. Thus, the test is

> whether the legislative requirement is a rational way to meet this compelling state interest. The least drastic means test becomes one of reasonableness, *i.e.*, whether the statute unreasonably encroaches on ballot access.

*Id.* at 793.

Petitioners have failed to present any compelling arguments that a ten percent (10%) figure is unreasonable or irrational. Their sole argument is that because it is higher than the access requirement, it *ipso facto* becomes unreasonable, a view rejected by all courts to date; that they are somehow no longer able to advocate their views and that they suffer other statutory disadvantages.

Its patent that, regardless of ballot status, Petitioners may continue to advocate their ideas in any lawful manner. The other consequences of loss of status are minimal and logically follow. Thus, if a party is not legally recognized, it would be a wasteful and unlawful expenditure of public funds to allow it to collect money from the public fund. It would be a similar waste of public funds to provide free lists (lists can always be obtained by payment of the "actual costs" to the agency) and when a party ceases to have legal status there is no reason to clutter the public records with data about affiliation with a defunct group.

A sound rule of reason has been articulated in cases involving the apportionment of state electoral districts. Population deviations of up to ten percent (10%) have been considered to be *de minimus*. In *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), the view was expressed that

substantial equality in population in electoral districts does "not in any commonsense way depend upon eliminating the insignificant population variations involved." Thus a retention percentage of ten per cent (10%) or less can easily be considered *de minimus*. When a retention percentage is in this range, the judgement of the state must be given great weight unless there is a clear showing that the percentage freezes out minor parties.

The historical record before the District Court and the Court of Appeals shows that the Libertarian Party and other minor parties have been able to obtain ballot access over the years, compelling evidence that the ten percent (10%) retention requirement has not operated to freeze out minor parties.

The historical record also shows the very low percentages of voters and financial contributions attracted by libertarian ideas over almost twenty years of advocacy and ballot access. (Ap, A-7, A-43 and A-44) Ultimately, to succeed, a political party must get a plurality of the registered voters to accept its views and elect its candidates. It is not disputed that those of libertarian belief have been free, since the beginning, to advocate their views in all non-electoral contexts. The North Carolina scheme allows Petitioners to obtain early access to the ballot and participate in two general elections. With a potential of over three years of ballot access, it is not unreasonable nor unduly restrictive to require the party to poll ten percent (10%) of the vote in a presidential year.

It is a truism that an idea whose time has come is irresistible and a group swept along by a new idea is equally irresistible. An example is the Ross Perot phenomenon in

1992 when Perot, running as an unaffiliated candidate, obtained ballot access and polled around 15% of the total vote for president in North Carolina. (Ap, A-55) (If Perot had run as a member of an organized political party, it would remain recognized today.) The historical record demonstrates that the real complaint of the Libertarian Party and its membership is that the ideas of Libertarianism have not been accepted.

The Respondents urge this Court to reject any absolute retention percentage and to deny the Petition as to this issue.

### B. There Is No Conflict Between The Fourth And Tenth Circuits On The Issue Of Changing The Public Registration Records As To The Affiliation Of Registered Voters With A Defunct Party.

The Fourth Circuit properly did not cite or consider *Baer v. Meyer*, 782 F.2d 471 (10th Cir. 1984). *Baer* involved a Colorado statutory scheme that distinguished between "political parties" (those whose gubernatorial candidates received the highest and next highest number votes at the last election) and "political organizations" (those who had obtained ballot access but failed to poll the requisite numbers to become a political party.) A "political organization", nevertheless, under earlier decisions of the Colorado Supreme Court, remained a recognized political entity if it had achieved ballot access in the past. The Colorado statutory scheme did not allow registrants on its rolls to show affiliation with "political organizations." This

practice was struck down because political organizations were recognized entities under Colorado law and there was a minimal administrative burden in having registration records include all lawfully recognized political groups.

The decision in *Baer* is limited to its own unique facts. Thus, four years after *Baer*, the Tenth Circuit reiterated the notion that "The state has a substantial interest in preventing 'the purely frivolous and insubstantial attempts to designate party affiliation on the registration form.' *Baer*, 728 F.2d at 475." *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740, 747 (10th Cir. 1988). Nevertheless, *Baer* was not deemed controlling and the Oklahoma disaffiliation scheme was upheld. "While an administrative burden in and of itself would not be sufficient to justify infringing important associational rights, we must consider it together with the state's interest in controlling party registration of tiny fractional interests." *Id.* at 747. This shows clearly that *Baer* is limited to its unique facts and it has not been extended beyond them. It is, therefore, not in conflict with the Fourth Circuit's decision.

There is only one way to become and remain a recognized "political party" in North Carolina which is to meet the ballot access and retention criteria. When any group fails to meet these criteria, it ceases to be a lawfully recognized political party and becomes a voluntary, albeit a politically orientated, association. Thus, in North Carolina a group is either a political party or it is not; it never assumes some other legal status as a political organization. Accordingly, *Baer* has no application to this scheme.

Later, another circuit declined to follow *Baer*, followed *Rainbow Coalition* and affirmed an Iowa scheme

that required disaffiliation if a party became defunct when it failed to poll two percent (2%) of the votes cast for president or governor. *Iowa Socialist Party v. Nelson*, 909 F.2d 1175 (8th Cir. 1990). As a part of its rationale, the Court noted that Iowa had closed primaries so that the "restriction on allowing registrants to indicate their preference for or affiliation with a political party is related to the state's interest in enabling political parties to conduct their closed primaries, it is not related to the burdening of [a minor party's] opportunities." *Id.* at 1181.

North Carolina conducts primary elections for all ballot qualified parties to select nominees for the general election. N.C. GEN. STAT. §§ 163-104 through -116. (A newly qualified party nominates by convention for the first general election and by primary thereafter. N.C. GEN. STAT. § 163-98) The right to vote in a primary election is limited by law to registrants who have declared and had their affiliation recorded on the voter registration records. N.C. GEN. STAT. § 163-59. A ballot qualified political party may, however, permit persons registered as "unaffiliated" to vote in its primary. N.C. GEN. STAT. § 163-74(a1).

Elections officials maintain data on the party affiliation of registered voters in order to administer the closed primary process. As a by-product of this principal purpose, the registration records provide information on party affiliation. Registration records are public records accessible to all under the public records law; the records may be examined for free and copies obtained by reimbursing the custodian the "actual cost" involved in reproducing the record. N.C. GEN. STAT. §§ 132-1 through -9. Recognized political parties are allowed to obtain free lists of the names of registrants and their affiliation at

specified intervals in the elections cycle. N.C. GEN. STAT. § 163-69.

The North Carolina scheme is different from Colorado's and quite similar to Iowa's; it does not recognize any political organization that fails to remain ballot eligible and it is put in place to administer a closed primary. To continue to maintain a list of members of defunct parties is a needless administrative burden on elections officials. It is a legitimate state interest to keep these administrative burdens to a minimum. *Baer, supra*; *Rainbow Coalition, supra*. A scheme that permits "voters to register only as members of recognized political parties or as Independent . . . does not prohibit . . . citizens from registering to vote, and does not prohibit registered voters from voting for candidates of their choice. . . . [It] simply . . . control[s] frivolous and insubstantial party registration." *Rainbow Coalition v. Oklahoma State Election Board*, 685 F. Supp. 1193, 1199 (W.D. Okl. 1987). Moreover, "Once a recognized political party ceased to exist, it would follow that its members can no longer be carried on the voter rolls as registered members of such defunct party." *Arutunoff v. Oklahoma State Election Board*, 687 F.2d 1375, 1379 (10th Cir. 1982, *cert. denied*, 461 U.S. 913 (1983). This is because "[a]t this time, the only reason for the state not to eliminate the party from the registration records would be to help promote the party. This is not a permissible state purpose." *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373, 387 (M.D.N.C. 1994) (Ap, p A-73)

In summary, *Baer* is not in conflict with the Fourth Circuit's decision in Petitioners' case and the disaffiliation requirement passes constitutional muster.

## V. CONCLUSION

For all of the foregoing reasons, the Respondents respectfully submit that the North Carolina statutory scheme passes constitutional muster. The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the District Court should be denied.

This the 22nd day of February 1996.

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